

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROBERT LANELL GRIFFIN,

Defendant-Appellant.

UNPUBLISHED

February 25, 2000

No. 216720

Berrien Circuit Court

LC No. 98-403728-FH

Before: Sawyer, P.J., and Gribbs and McDonald, JJ.

PER CURIAM.

Defendant was convicted by a jury of possession with intent to deliver greater than 225 but less than 650 grams of cocaine, MCL 333.7401(2)(a)(ii); MSA 14.15(7401)(2)(a)(ii). He was sentenced as a second offender, MCL 333.7413(2); MSA 14.15(7413)(2), to a term of twenty to sixty years. We affirm.

On appeal, defendant contends that the trial court abused its discretion by allowing the arresting officer to testify regarding the significance he placed upon the bundled air fresheners, cellular telephone, and pager found in the car after defendant had been arrested. It is defendant's contention that this was drug courier profile testimony improperly offered by the prosecution as substantive evidence of his guilt. There is no merit to this claim.

A drug courier profile is a somewhat informal compilation of otherwise innocuous characteristics believed by law enforcement to be typical of persons unlawfully trafficking in narcotics. See *People v Hubbard*, 209 Mich App 234, 239; 530 NW2d 130 (1995). These profiles are commonly used by police officers as an investigative technique to establish a basis for reasonable suspicion to stop and question a suspect, or to form probable cause. *Id.*; *United State v Lui*, 941 F2d 844, 847 (CA 9, 1991). This Court has previously held that because such profiles "may suggest that innocuous events indicate criminal activity," drug courier profile evidence is inherently prejudicial and thus inadmissible as substantive evidence of guilt. *People v Murray*, 234 Mich App 46, 53; 593 NW2d 690 (1999); *Hubbard, supra* at 240-241. In other words, the evidence may not be admitted for the purpose of demonstrating that the defendant is guilty because he fit the characteristics of a certain drug profile. This is not to say, however, that testimony concerning such characteristics is to be considered inadmissible

on all grounds. Evidence concerning background or modus operandi does not specifically address the guilt or innocence of the defendant, but rather enables the jury to understand other evidence that does address guilt or innocence. *Murray* at 54.

Noting that the distinction between the proper use of profile evidence as background or modus operandi evidence and its improper use as substantive evidence of guilt is often subtle, the *Murray* Court outlined several factors which it considered helpful to a determination of the admissibility of such evidence:

First, the reason given and accepted for the admission of the profile testimony must only be for a proper use – to assist the jury as background or modus operandi explanation. . . . Second, the profile, without more, should not normally enable a jury to infer the defendant's guilt. The prosecutor must introduce and argue some additional evidence from the case that the jury can use to draw an inference of criminality; multiple pieces of a profile do not add up to guilt without something more. In other words, the pieces of the drug profile by themselves should not be used to establish the link between innocuous evidence and guilt. *Third, because the focus is primarily on the jury's use of the profile, courts must make clear what is and what is not an appropriate use of the profile evidence.* Thus, it is usually necessary for the court to instruct the jury with regard to the proper and limited use of profile testimony. *Fourth, the expert witness should not express his opinion, based on a profile, that the defendant is guilty, nor should he expressly compare the defendant's characteristics to the profile in such a way that guilt is necessarily implied.* [*Id.* at 56-57 (Emphasis added)(Citations omitted).]

In this case, the prosecutor offered two proper reasons for admission of the disputed testimony, each of which was ostensibly proper. First, the prosecutor argued at trial that the testimony was necessary to explain the events which led the trooper to conduct a search of defendant's vehicle. On this basis, the testimony was not improper drug profile evidence, but rather permissible testimony offered to explain why the trooper continued his investigation of the automobile following defendant's misdemeanor arrest. See *United States v Gomez-Norena*, 908 F2d 497, 501 (CA 9, 1990). The disputed testimony provided the logical connection which gives meaning to the trooper's actions, without which the jury would have been forced to speculate on the trooper's motive or rationale in furthering the investigation. See, e.g., *People v Flynn*, 93 Mich App 713, 719-720; 287 NW2d 329 (1979). The prosecutor also argued that the testimony was necessary to educate the jury as to the drug-related uses for these otherwise innocuous items of which the jury would be otherwise unaware, again, a permissible use of profile evidence. *Murray, supra* at 59.

Nor was the profile testimony offered by the trooper the sole evidence upon which the jury could infer guilt. The prosecutor did not mention the profile evidence during closing arguments, and did not attempt to present that evidence as a link between defendant and the illegal drugs. At trial, defendant conceded that the sole issue material to defendant's guilt or innocence was whether he had knowledge of the cocaine found in the trunk of the car. A narcotics officer who was qualified as an expert on the value of cocaine testified that the more than 500 grams of cocaine found in the trunk of the

car had a value of between \$9,000 and \$30,000 depending upon how the drug processed and sold. Considering that defendant was the sole occupant of the car at the time it was stopped, the jury could reasonably infer that defendant had knowledge of the cocaine as it is unlikely that an individual would entrust such a highly valuable cargo to an unknowing transporter. It could likewise be inferred that the writing on the back of the business card found during the arresting officer's search was consistent with a record of drug sales or purchases. While ownership of the card was disputed, the prosecutor also introduced an address book found on defendant that contained an abbreviated name identical to one of those found on the back of the card, strengthening the inference that the card was in fact defendant's. Furthermore, the claimed owner of the card, who was defendant's cousin and the owner of the car in which the cocaine was found, testified at trial that although he received that business card from a friend, he could not recall that friend's name. Defendant's cousin further stated that he did not know the real names of any of the people whose names were abbreviated on the card, although he had written them down himself, and could not remember what the numbers printed next to each name represented. Moreover, this individual stated that he was certain that he and defendant had no common associates or friends.

As defendant argues, no cautionary instruction was given in this case. However, because defendant failed to request any instruction limiting the use of the trooper's testimony, the court's failure to so instruct the jury cannot be grounds for setting aside the verdict. See MCL 768.29; MSA 28.1052. Moreover, the lack of a jury instruction on this matter is merely one consideration in the determination of the admissibility of the disputed evidence. See *Murray, supra* at 57, citing *United States v Williams*, 957 F2d 1238, 1241 (CA 5, 1992); *Gomez-Norena, supra*.

Finally, the trooper who testified in this case did not attempt to link the profile testimony to defendant in a manner that would suggest his guilt simply from his resemblance to profile characteristics. The trooper merely testified that in his experience drug couriers often use air fresheners to mask the smell of drugs, and that some use pagers and cellular telephones in order to stay in constant communication with customers and suppliers. This testimony was proper explanation of the modus operandi of drug dealers, but left to the jury the decision as to whether these innocuous items were in fact used for these purposes by defendant. *Murray, supra* at 62.

As a final consideration, we note that defendant also argues that because the trooper was never qualified as an expert by the court, his testimony as to the significance of these items was admitted in error. However, at trial defendant did not object to the trooper's testimony on this basis. Defendant's argument below was merely that the substance of the trooper's testimony was improper, not that the trooper lacked the "knowledge or expertise" to reliably testify to such facts. See MRE 702. Moreover, on appeal, defendant does not challenge the trooper's qualifications as an expert regarding his observations during a drug arrest, but only the fact that he was not specifically qualified as such an expert by the trial court.

Where there has been no objection, this Court will not review the admission of evidence absent a showing of manifest injustice. MRE 103(a)(1); *People v Metzler*, 193 Mich App 541, 548; 484 NW2d 695 (1992). A person may be qualified to testify as an expert witness by virtue of his or her knowledge, skill, experience, training, or education in the subject matter of the testimony. MRE 702;

see also *People v Fowler*, 193 Mich App 358, 362-363; 483 NW2d 626 (1992). In this case, the trooper testified that he had nearly six years of law enforcement experience and that he had participated in many traffic stops that had resulted in the discovery of illegal drugs. Thus, the trooper would in all probability have been qualified as an expert for purposes of his limited testimony even if defendant had raised any challenge to his qualifications to testify regarding the modus operandi of drug traffickers. We find no manifest injustice.

Affirmed.

/s/ David H. Sawyer

/s/ Roman S. Gibbs

/s/ Gary R. McDonald